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IN THE COURT OF APPEAL OF ZAMBIA APPEAL 66/2020

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

ISAAC NGOSA

AND

THE PEOPLE



APPELLANT

RESPONDENT

CORAM: Mchenga DJP, Chishimba, NgulubeJJA,

13th October, 2020 and 23rd October, 2020.

For the Appellant: Mr. B. Banda- Legal Aid Counsel, Legal Aid Board.

For the Respondent: Mr. G. Zimba-Deputy Chief State Advocate National Prosecutions Authority.

J U D G M E N T

Mchenga, DJP, delivered the Judgment of the Court.

Cases referred to;

1. Geoffrey Muyoka v The People [1986] Z.R. 34
2. Adam Berejena v The People [1984] Z.R. 19
3. Jutronich, Schutte and Lukin v The People [1965]Z.R. 9
4. Akabondo Siumbwanyambe v The People Appeal No. 200 of 2017
5. The People v Ndema Simolu [1981] Z.R 318

Legislation referred to;

1. The Penal Code, Chapter 87 of the Laws of Zambia

1. Background

1.1 The appellant, initially appeared in the Subordinate Court sitting at Serenje (Hon. Sato), charged with two offences. In the 1st count, he was charged with the offence of assault occasioning actual bodily harm contrary to **Section 248 of the Penal Code**. The charge in the 2nd count, was that of rape, contrary to **section 132 of the Penal Code**.

1.2 At the conclusion of those proceedings, he was convicted of both offences. He was sentenced to 24 months imprisonment, for the assault and sentencing for the rape, was deferred to the High Court.

1.3 In the High Court (Limbani, J) imposed a sentence of 40 years imprisonment with hard labour, for the rape.

1.4 The appellant has now appealed against the sentence for the rape only.

2. Evidence before trial court

2.1 The evidence before the trial magistrate was that on 9th May 2019, around 19:00 hours, the prosecutrix was walking to her village, Musangashi, in Serenje district, when she met the appellant. He offered to carry her on his bicycle, but they ended up walking together, because he failed to cycle.

2.2 As they walked together, the appellant held the prosecutrix by the neck and pushed her to the ground. He then began to undress her but he stopped, when she bit him on his hand with her teeth. He then hit her in the face and on the head, several times and when he had subdued her, dragged her into the bush.

2.3 In the bush, he tore her clothes and started raping her. While in the act, Nelson Nkandu, who was also on his way to Musangashi Village, heard the prosecutrix crying out and went to her aid.

However, he failed to rescue her because the appellant threatened him.

2.4 When the appellant finished raping her, he started beating the prosecutrix again. He continued beating her even after Nelson Nkandu advised him that beatings may become fatal.

2.5 The appellant only stopped and left, when the prosecutrix lost consciousness.

2.6 The following morning the prosecutrix was found by passers-by who took her to the hospital. She was to remain in the hospital for five days.

3. Proceedings before the High Court

3.1 When imposing the sentence for the rape, the judge indicated that he was imposing a sentence of 40 years imprisonment, having considered the circumstances in which the offence was committed and in particular, that he was 27 years old and the prosecutrix was 57 years old. She was old enough to be his grandmother, he opined.

3.2 In addition, the judge noted that the attack left the prosecutrix hospitalised, for 5 days.

4. Ground of appeal and arguments by counsel

4.1 The sole ground of appeal is that the 40 years sentence of imprisonment, with hard labour, was excessive, given that that the appellant was a first offender who was youthful and remorseful.

4.2 On behalf of the appellant, MrBanda submitted that the 40 years sentence imposed by the High Court, should to come to this court with a sense of shock, as being excessive, because the appellant is a first offender, who was remorseful and was of youthful age. On that score, he was entitled leniency. He referred to the cases of **Geoffrey Muyoka v The People**¹ and **Adam Berejena v The People**², in support of his arguments.

4.3 He urged us to allow the appeal, quash the sentence imposed by the High Court and substitute

it with the mandatory minimum sentence of 15 years.

4.4 Responding on behalf of the people, Mr. Zimba submitted that the sentence imposed on the appellant, was appropriate considering the manner in which the offence was committed. He drew our attention to the fact that the appellant tore off the victim's clothing and left her naked. Further, he beat her and she remained unconscious until the early hours of the following day.

4.5 Mr. Zimba also pointed out that the prosecutrix, a 57 years old woman, suffered the humiliating attack at the hands of a young man.

4.6 As regards the submission that the appellant was remorseful, Mr. Zimba took the view that it was not supported by the evidence on record.

5. Considerations of the matter by this court and decision

5.1 In determining whether or not the sentence imposed by the High Court must be tampered with, this court is subject to the guidelines articulated in the case of **Jutronich, Schutte and Lukin v The People**³. In that case, the Supreme Court held as follows;

"In dealing with appeals against sentence the appellate court should ask itself these three questions:

- (1) Is the sentence wrong in principle?
- (2) Is the sentence so manifestly excessive as to induce state of shock?
- (3) Are there exceptional circumstances which would render it an injustice if the sentence was not reduced?

Only if one or other of these questions can be answered in the affirmative should the appellate court interfere."

5.2 While we agree with Mr. Banda, that a first offender who express remorse, is entitled to leniency, what ultimately determines the sentence, are the circumstances in which the offence was

committed; see the case of **The People v Ndema Simolu**⁴.

5.3 It follows, that where there are facts that aggravate the circumstances in which an offence was committed, a court can impose a severe sentence even when the convict is a first offender and has expressed remorse.

5.4 In the case of **AkabondoSiumbwanyambe v The People**⁵, the Supreme Court increased the sentence that was imposed on the appellant, on account of the age of the victim.

5.5 We have considered the circumstances in which the offences were committed in this case. First of all, the appellant lured the prosecutrix, who was 40 years his senior, on the pretext that he would carry her home, only to rape her. After raping her, he continued to assault her despite being advised not to do so.

5.6 All this took place in an environment in which there has been a steady increase in the number of sexual offences against women. The appellant's conduct, particularly continuing to attack the prosecutrix, even after he had been discovered and advised to stop, displayed the worst kind of arrogance and impunity.

5.7 In the circumstances, we find that the sentencing judge was entitled to take into account of the age of the victim when arriving at the sentence. The 40 years sentence imposed on the appellant does not come to us with any sense of shock.

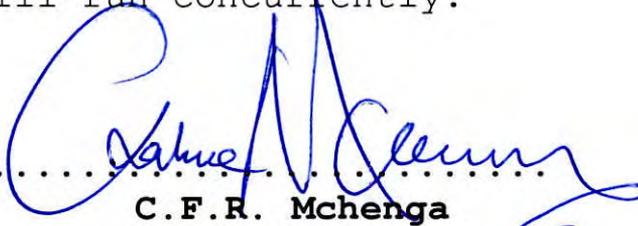
5.8 The sole ground of appeal accordingly fails.

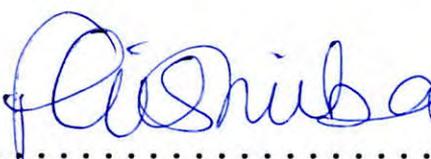
6. Verdict

6.1 The sole ground of appeal having failed, this appeal is unsuccessful. We accordingly dismiss it and uphold the sentence imposed by the High Court.

6.2 The matter does not end there, we note that the judge did not indicate whether the 40 years

sentence he had imposed was going to run concurrent or consecutive, to the sentence imposed by the Subordinate court. Since the offences arose out of one course of conduct, we order that the sentences will run concurrently.


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C.F.R. Mchenga
DEPUTY JUDGE PRESIDENT


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F. M. Chishimba
COURT OF APPEAL JUDGE


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P.C.M Ngulube
COURT OF APPEAL JUDGE